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Division III
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IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE
NO. 354199

STATE OF WASHINGTON,

Respondent,

v.

DYMON LEE WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Michael McCarthy

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Dymon Lee Williams accepts this opportunity to reply to the State's brief. Mr. Williams requests the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. The State's *Statement of the Case* improperly implies it is Mr. Williams' burden to prove his innocence at trial.

Mr. Williams objects to any inference in the State's response brief that directly states or implies Mr. Williams had a duty to prove his innocence at trial. In the State's brief, the first line in its Statement of the Case is as follows: "It should be noted that Mr. Williams chose [sic] stand by his right not to take the stand and he did not testify in this trial." See Respondent's Brief p. 2.

Mr. Williams has a constitutional right to remain silent. "At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). The State is barred from making comments relating to the defendant's silence in order to infer guilt. *Id.*

The State may not infer Mr. Williams' silence at trial was in fact proof of guilt. Respondent's Brief p. 2.

2. The State's *Statement of the Case* misstates the dates of Mr. Williams' residence at 3405 Clinton Way.

The State's brief claims Mr. Williams lived at 3405 Clinton Way
"only for a bit...like March of 2015". Respondent's Brief p. 3.

Rather, the record reflects no specific date was given for Mr.
Williams' time of residence in that home:

Q. When you were in the relationship with Mr. Williams,
did he reside with you in the home?

A. Yes.

Q. And is that referring to 3405 Clinton Way?

A. Yes. It was only for a little bit when he resided there.

Q. When did you move to 3405 Clinton Way?

A. May. No, it was like March of 2015, I think.

RP 80, vol. II.¹

3. Insufficient evidence was presented that Mr. Williams committed first degree burglary.

This argument pertains to Issue 1 raised in Mr. Williams' opening
brief and he requests this Court refer to his brief for further argument on
this issue. Appellant's Brief pp. 9-17.

The State concludes that the no contact order prohibited Mr.
Williams from being at Ms. Caldera Lazo's residence. Respondent's Brief

¹ Three different volumes were transcribed in this case. This brief will refer to the volume transcribed by Amy M. Brittingham and the court dates therein (November 18, 2016 through July 7, 2017) as "vol. I." This brief will refer to the volume transcribed by Joan E. Anderson and the court dates therein (May 22-25, 2017) as "vol. II." The third volume will not be referenced herein.

p. 8-9. Mr. Williams disagrees. The language of the no contact order is unclear, it does not prohibit Mr. Williams from Ms. Caldera Lazo's residence, and it is very similar to the no contact order in *State v. Wilson*. Appellant's Opening Brief pp. 13-16; *State v. Wilson*, 136 Wn. App. 596, 604-05, 150 P.3d 144 (2007).

Also, the State asserts Mr. Williams' situation is more akin to *State v. Jacobs*, 101 Wn. App. 80, 2 P.3d 974 (2000), than *Wilson*, 136 Wn. App. 596. Respondent's Brief p. 12. However, the facts in this case are much different than in *Jacobs*.

In *Jacobs* the court held the defendant had no standing to challenge a search because he did not live in the residence. 101 Wn. App. at 88. Also, the court determined the felony no contact order was not vague because even though the no contact order did not prohibit the defendant from going to a specific residence, it did prohibit contact with the victim and an ordinary person would understand being in the victim's home would violate the order. *Id.* at 88-89.

Notably, the *Wilson* court observed the defendant in *Jacobs* did not live with the victim. *Wilson*, 136 Wn App. 596, 608 n. 5, 150 P.3d 144 (2007). In fact, the defendant in *Wilson* lived with the victim and the no contact order did not prohibit the defendant from the residence. 136 Wn. App. at 608-609. As the *Wilson* court explained:

. . . the purpose of a burglary statute is to protect the occupancy and habitation of a residence Although the purpose of a no-contact order is to prevent a victim from having to face her batterer, the burglary statute's intent is to allow an occupant to prevent all those who are unwelcome from entering the premises. It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building.

136 Wn. App. at 608–09.

Jacobs is not analogous to Mr. Williams' situation. 101 Wn. App.

80. Mr. Williams was in the residence for a birthday party within 2 days prior to the incident, was previously in a long-term relationship with Ms. Caldera Lazo, had lived in the residence at one point, had two children with her, stored items in her home, and had been physically intimate with her the same evening as the birthday party. RP 65–66, 80-81,87, vol. II. Mr. Williams had implied permission to be in the home.

The State also argues that Ms. Caldera Lazo revoked any invitation when she asked Mr. Williams to leave the residence. Respondent's Brief at 12-13. Yet Ms. Caldera Lazo's testimony regarding whether she told him to leave was unclear:

Q. When you saw him in the bathroom, did you ever tell him to leave?

A. Yes.

Q. When was that?

A. I don't know. I mean, probably when I -- after he snatched my underwear off. I don't know. It's been a while. I don't remember exactly the conversation.

RP 85, vol. II. The record shows Ms. Caldera Lazo does not know when she asked Mr. Williams' to leave. RP 85, vol. II. Without knowing when permission might have been revoked, Mr. Williams could not have "unlawfully remained" in Ms. Caldera Lazo's residence. RCW 9A.52.010. Nor is it enough to say Mr. Williams intended to commit a crime in Ms. Caldera Lazo's residence, and that he therefore unlawfully remained. *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998) (lawful entry with intent to commit a crime does not necessarily constitute burglary, because "under this theory every shoplifting inside a building would be elevated from a misdemeanor to the class B felony of second-degree burglary [and] [m]ost other indoor crimes might also be elevated to burglary").

The State further cites *State v. Sanchez*, 166 Wn. App. 304, 271 P.3d 264 (2012), and *State v. Stinton*, 121 Wn. App. 569, 89 P.3d 717 (2004), for the proposition that this Court has ruled entry is unlawful when done in violation of a court order despite permission of the protected person. Respondent's Brief p. 13.

However, both *Sanchez* and *Stinton* are distinguishable from this case. The *Sanchez* court noted the no contact order in that case specifically prohibited the defendant from the protected person's

residence. 166 Wn. App. at 310-312. Citing *Wilson*, the *Sanchez* court concluded a no contact order must specifically exclude a person from a protected person's residence in order to support unlawful entry for a burglary conviction. *Id.* (citing *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007)). *State v. Stinton* precedes *Wilson*, but the protection order in that case also specifically excluded the defendant from the residence. 121 Wn. App. 569, 571, 989 P.3d 717 (2004). Here, in contrast, Mr. Williams was not specifically excluded from Ms. Caldera Lazo's residence. Appellant's Opening Brief p. 14-15.

Mr. Williams requests this Court refer to his opening brief.

Insufficient evidence exists to sustain the first-degree burglary conviction and the conviction must be vacated.

4. The State misconstrues the appellant's arguments in regard to the prejudicial criminal history contained in admitted exhibits.

This argument pertains to Issue 2 in Mr. Williams' opening brief. Mr. Williams argues his defense counsel was ineffective because he did not object to the admission of prejudicial criminal history. Appellant's Brief pp. 17-23.

The State asserts Mr. Williams must raise his issue regarding the improper admission of criminal history under RAP 2.5(a)(3). Respondent's Brief p. 14-15. A defendant may raise an issue for the first time on appeal in the context of ineffective assistance of counsel, but

actual prejudice must exist for an asserted error to be “manifest” as required for consideration under RAP 2.5(a)(3). *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995); Appellant’s Brief pp. 17-23. Because the unredacted criminal history was extremely prejudicial to the trial’s outcome—especially because this is a domestic violence case wherein the risk of prejudice is very high—the error was manifest. *See State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014); *also* Appellant’s Brief pp. 17-23.

The State asserts it has a right to present evidence of prior convictions in order to prove a felony violation of a protection order. Respondent’s Brief at 13-22. Mr. Williams never claimed the State did not have a right to present evidence of prior convictions for violating a court order in order to prove a felony violation of a protection order. Appellant’s Brief pp. 21-23.

Yet, Mr. Williams does assert defense counsel was ineffective for failure to object to specific unredacted portions of the complaint and fingerprint cards presented to the jury (despite other redactions made in the same documents, not all appropriate redactions were made to the redacted State’s Exhibits 5 and 6). Appellant’s Brief pp. 21-22. State’s Exhibits 5 and 6, which were presented to the jury, are not to be confused with State’s Exhibits 5A and 6A, which were not presented to the jury per

counsel's discussion and agreement on the record. RP 98, vol. II; *see also* CP 500-501 (listing unredacted exhibits). Some redactions do exist on State's Exhibits 5 and 6, and with those Mr. Williams takes no issue. But it is the additional items listed on State's Exhibits 5 and 6 (and as previously argued by Mr. Williams in his opening brief) which should not have been presented to the jury. Appellant's Brief. p. 21-22. Specifically, the unredacted portions of the complaint in State's Exhibit 5 (listing an unredacted but charged and dismissed domestic violence third degree malicious mischief in count one) and the unredacted portions of the fingerprint cards in State's Exhibit 6 (listing unredacted citations for third degree malicious mischief—domestic violence, and criminal trespass in the second degree) are the items with which Mr. Williams takes issue. Appellant's Brief p. 21.

Mr. Williams requests the Court further refer to his opening brief on this topic. Appellant's Brief pp. 17-23. The case should be remanded for retrial.

5. The trial court erred by not finding first degree burglary and felony violation of a protection order were same criminal conduct.

This argument pertains to Issue 3 in Mr. Williams' opening brief. Mr. Williams argues his first-degree burglary and felony violation of a protection order convictions should have been counted as same criminal

conduct. Mr. Williams requests the Court refer to his opening brief on this issue. Appellant's Brief pp. 23-29.

The State claims Mr. Williams did not challenge the trial court's findings and conclusions in his opening brief. Respondent's Brief p. 22. The State is mistaken, as appellant assigned error to those findings and conclusions, as well as discussed them in his opening brief. Appellant's Brief p. 2-3, 23-29.

The State also claims same criminal conduct does not apply because the elements of the crimes of first-degree burglary and felony violation of a protection order are not the same. Respondent's Brief at p. 25. The State misapplies the law; whether crimes contain the same elements is not an appropriate portion of the analysis. *See State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987), *supplemented*, 109 Wn.2d 207, 749 P.2d 160 (1988) (finding kidnapping and robbery of a single victim should be treated as same criminal conduct); RCW 9.94A.589.

The State also argues the children in the home were additional burglary victims, and therefore the trial court did not abuse its discretion in denying same criminal conduct because both felonies did not have the same victims. Respondent's Brief p. 25. This argument is without merit because the State did not list the children as victims in its charging

document nor in its jury instructions. CP 157, 510. Moreover, the State removed an aggravator regarding the children from initial charging documents, likely because the children were found to be sleeping during the incident. RP 15-16, vol. I; CP 23, 36-37, 39. Ms. Caldera Lazo was the only victim listed under the first-degree burglary charge. CP 157.

The case should be remanded for resentencing.

6. Appellant concedes the costs of medical care were not ordered by the trial court and thus review of that legal financial obligation is unnecessary.

This argument pertains to Issue 4 raised in Mr. Williams' opening brief. Mr. Williams challenged the imposition of costs of incarceration and medical care costs. Appellant's Brief pp 30-35.

The State correctly points out that the box for "costs of medical care" was not checked on the judgment and sentence, indicating Mr. Williams will not be required to pay those. Respondent's Brief p. 28-29; CP 599. Mr. Williams concedes this is not an issue in this appeal.

However, Mr. Williams does still challenge the trial court's imposition of \$250 in costs of incarceration and requests this Court refer to his opening brief on this issue. Appellant's Brief p. 30-35. The trial court did not check the box on the judgment and sentence imposing the costs of incarceration, but did order those costs to be capped in the amount of \$250 and handwrote a notation as such. CP 598; RP 61, vol. I.

C. CONCLUSION

Based upon the arguments set forth above and those set forth in Mr. Williams' opening brief, Mr. Williams requests his conviction for first degree burglary (Count 1) be vacated for insufficient evidence.

In the alternative as to Count 1, while simultaneously including Count 2 (felony violation of a protection order), Mr. Williams requests a new trial because he was denied his Sixth Amendment right to effective assistance of counsel, counsel's deficiencies affected the outcome of the trial, and the error depriving Mr. Williams of his constitutional right to effective assistance of counsel was manifest.

Alternatively, Mr. Williams respectfully requests this Court remand his case for resentencing as the trial court abused its discretion by failing to find same criminal conduct for Counts 1 and 2, which would affect his offender score, and likely also affect the length of his exceptional sentence.

The trial court erred by imposing discretionary legal financial obligations; Mr. Williams requests the case be remanded for resentencing.

Respectfully submitted this 29th day of May, 2018.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35419-9-III
vs.)
DYMON LEE WILLIAMS) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, of Nichols and Reuter, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 29, 2018, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission from the Yakima County Prosecutor's Office, I also served the Respondent State of Washington at appeals@co.yakima.wa.us using Division III's e-service feature.

Dated this 29th day of May, 2018.

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